No. 85-782

In The
Supreme Court of the United States
October Term, 1985

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

LUZ MARINA CARDOZA-FONSECA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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STATEMENT OF INTEREST

The American Immigration Lawyers Association is a national organization of practicing lawyers and law school professors who practice and teach in the fields of Immigration and Nationality law. The Association has a direct and serious interest in the development of Immigration and Nationality law and in the case presently before the Court. The standard of proof to be applied in immigration hearings concerning asylum under § 208 of the Immigration and Nationality Act directly affects many of the Association's members and clients. The Association is submitting its brief in support of the respondent's position. All parties have consented to the filing of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976) should be applied to establish the appropriate standard of proof for asylum claims under § 208 of the Immigration and Nationality Act. In *Mathews*, this Court recognized that "'[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) . . . . 'Due process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)." *Mathews*, 424 U.S. at 334.

This Court's sensitivity to these concerns has resulted in an analysis that recognizes the importance of minimiz-

ing the risk of erroneous decisions in cases with drastic consequences. *Addington v. Texas,* 441 U.S. 418 (1979); *In Re: Winship,* 397 U.S. 358 (1970); and *Speiser v. Randall,* 357 U.S. 513 (1958). Although immigration cases have been characterized as civil proceedings, *I.N.S. v. Lopez-Mendoza,* 104 S.Ct. 3479, 3484 (1984), this Court has recognized that fundamental liberty interests may be implicated because deportation may lead to "persecution or even death." *Bridges v. Wixon,* 326 U.S. 135, 164 (1945). Asylum determinations pose drastic consequences for an applicant if the decisionmaker errs. Indeed, asylum proceedings are more akin to death penalty cases in their consequences for erroneous decisionmaking than they are to routine immigration proceedings.

The consequence of an erroneous decision in asylum must be considered in the context of the likelihood that such error would be committed. Both institutional and cultural factors in the asylum process substantially increase the likelihood of an erroneous decision. Among the institutional factors which increase the likelihood of an erroneous decision in asylum proceedings are the methods for decisionmaking used by the immigration judges and the State Department, the applicant's difficulty in establishing his claim, and the politicization of the asylum process. Cultural and linguistic factors also enhance the potential for erroneous decisions. Perhaps more than any other legal proceeding, the asylum decision critically rests on an evaluation of the applicant's credibility. *Damaize-Job v. I.N.S.*, 787 F.2d 1332, 1336-37 (9th Cir. 1986). Yet cultural differences so central to that credibility assessment could not be greater than those between an immigration judge and a recently arrived applicant. The interplay between the asylum applicant's culture and the court's perception of credibility, in both verbal and nonverbal communication and conceptualization, increases the risk of erroneous decisions.

In reaching its decision, the Court below recognized that the burden of proof continues to remain with the applicant. The potentially drastic effects of an erroneous decision in asylum are mitigated, however, if this Court provides a less onerous standard of proof which can compensate for the institutional and cultural problems inherent in the asylum process. The more generous standard advanced by the court below is consistent with this Court's analysis in *Mathews* and its concern for minimizing the risk of erroneous decisionmaking. The three pronged *Mathews* test supports a more generous standard in the asylum context. The asylum applicant's interest is of the highest order and may involve life itself. The risk of an erroneous deprivation, by virtue of a higher standard of proof, is considerable given the institutional and cultural problems inherent in the asylum process. The government will suffer no greater fiscal or administrative burden by the use of a burden more sensitive to the special evidentiary and cultural problems of proof faced by the asylum applicant. The decision of the lower court, therefore, is supported by this Court's determination in *Mathews* and its continuing concern for the suppression of error in the administrative process, particularly when the consequences of an erroneous decision are so substantial.

ARGUMENT

This Court has repeatedly expressed its concern that the standard, as well as, the burden of proof should be allocated in a manner consistent with the risk and consequence of error in the decisionmaking process. *Addington v. Texas,* 441 U.S. 418 (1979); *In Re: Winship,* 397 U.S. 358 (1970); *Speiser v. Randall,* 357 U.S. 513 (1958). In *Addington,* this Court recognized that:

> The function of a standard of proof . . . is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In Re: Winship,* 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington, 441 U.S. at 423.

The Court further observed that "[i]n considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest . . . and the state's interest . . . . Moreover, we must be mindful that the function of the legal process is to minimize the risk of erroneous decisions." *Id.* at 425.

The Court's consideration of the questions of risk and consequence of error is consistent with the long-standing view that "[d]ue process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances," *Cafeteria Workers v. McElroy,* 367 U.S. at 895, and that due process "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. at 481. This view of due process and the concern that the standard of and procedures for review consider the possibilities of erroneous deprivations have been crystalized in *Mathews v. Eldridge,* 424 U.S. 319 (1976). To determine the content of due process, including the appropriate standard of proof in the administrative context, the Court must consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

A. The Private Interest Affected.

The private interest at stake is paramount. Other than capital cases where the death penalty is a potential outcome, no other litigation, except asylum, subjects an individual to such drastic consequences if an erroneous decision is made. In asylum adjudication, the private interest factor implicates life or death stakes that are the highest possible,[1] No other "civil" litigation potentially

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[1] *H.R.C. v. Civiletti,* 503 F. Supp. 442 (S.D. Fla. 1980), aff'd as modified *sub nom H.R.C. v. Smith,* 676 F.2d 1023 (5th Cir. 1982); *Orantes-Hernandez v. Smith,* 541 F.Supp. 351, 377 (C.D. Cal. 1982); *Nunez v. Bolden,* 537 F.Supp. 578, 586 (S.D. Tex.), *appeal dismissed,* 692 F.2d 755 (5th Cir. 1982); See also, *Coriolan v. I.N.S.,* 559 F.2d 993 (5th Cir. 1977); ABA Section of Individual Rights and Responsibilities, Report to the House of Delegates, 3-13 (Mimeo Aug. 1982). (Seeking ABA efforts to assure that immigration reform legislation would provide extensive procedural protection for asylum applicants based on observation that asylum may be a "life or death" matter).

subjects an individual to torture or summary execution if a case is wrongfully denied. The courts have repeatedly recognized the drastic consequences of an erroneous decision. *H.R.C. v. Civiletti,* 503 F.Supp. 442, 454-455 (S.D. Fla. 1980), aff'd as modified *sub nom. H.R.C. v. Smith,* 676 F.2d 1023 (5th Cir. 1982).

In the immigration context, this Court has not hesitated to adjust the standard of proof to the potential drastic consequences of an erroneous decision. Although deportation proceedings are generally civil in nature, *I.N.S. v. Lopez-Mendoza,* 104 S.Ct. 3479, 3484 (1984), this Court has required the government to meet a higher standard of proof even in deportation proceedings, recognizing the serious implications of deportation. In *Woodby v. I.N.S.,* 385 U.S. 276 (1966), the Court established the requirement that the INS must prove deportability by "clear, unequivocal and convincing evidence." This Court reasoned that while a deportation proceeding is not a criminal prosecution:

> [I]t does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.

Woodby, 385 U.S. at 285.

Moreover, this Court has recognized that special due process interests are at stake in deportation cases where "[r]eturn to [one's] native land may result in . . . persecution and even death." *Bridges v. Wixon,* 326 U.S. 135, 164 (1945). *See also, Wong Yang Sung v. McGrath,* 339 U.S. 33, 49 (1950); *H.R.C. v. Civiletti,* 503 F.Supp. 442, 455 (S.D. Fla. 1980) ("In a very graphic sense the political asylum applicant who fears to return to his homeland because of persecution has raised the spectre of truly severe deprivation of life, liberty and property; in this case harassment, imprisonment, beating, torture and death.)

Because the private interest that will be affected by an erroneous decision is so substantial, the first prong of the *Mathews* test supports a more generous standard than that of "clear probability."[2]

B. The Risk Of An Erroneous Deprivation Of Such Interests Through The Procedures Used.

The procedures employed in the adjudication of asylum claims have notable institutional and cultural problems.[3] The deficiencies in the asylum process attributable to institutional and cultural factors enhance the likelihood of error in the asylum process.

Immigration hearings on asylum claims are fraught with procedural difficulties. There are few operative evidentiary rules governing immigration proceedings and, at present, there are no rules of court. Immigration judges have "broad authority for an active or inquisitorial role . . . . The statute expressly authorizes them to present or

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[2]Unlike the finding of deportability itself, the burden to prove asylum, even with the more generous standard argued for here, will remain with the applicant. 8 C.F.R. § 208.5 (1986).

[3]Kurzban, *Restructuring the Asylum Process,* 19 San Diego L Rev., 91, 98-110 (1981).

receive evidence, and also to interrogate, examine and cross-examine witnesses, including the alien respondent." Aleinikoff and Martin, *Immigration Process and Policy* 88 (1985). This non-adversarial model has been criticized particularly because it takes place in a setting where the decisionmaker "by training and background may be biased toward enforcement and skeptical of the alien's claim." *Id.; See, Developments in the Law: Immigration Policy and the Rights of Aliens,* 96 Harv. L. Rev. 1286, 1363-66 (1983); M. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws,* 13 San Diego L. Rev. 144, 147-48 (1975). Furthermore, this adjudicatory process has been governed by a system of "secret law"[4] and "negative jurisprudence"[5] where no decisions of the immigration judges are officially published and the vast majority of the Board of Immigration Appeals decisions are unpublished. All these decisions, therefore, are non-precedential.

The task of adjudicating an asylum claim is further complicated for immigration judges because it requires them to evaluate the political and economic conditions that the applicant has fled. An inquiry of this sort obviously calls for a type of judgment that exceeds the typical judicial function; it requires the making of moral and political judgments for which there are no manageable

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[4]Davis, *Administrative Law: Cases-Text-Problems* 86 (1965).

[5]Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement,* 72 Colum. L. Rev. 1293, 1341 (1972).

standards.[6] This problem is exacerbated by the lack of training or the development of expertise by the adjudicators on the political and social conditions in countries or issues concerning international law and foreign affairs.[7]

The procedural and institutional problems associated with asylum adjudications are further complicated by reliance upon State Department recommendations concerning political asylum. 8 C.F.R. § 208.10(b) (1985) (BHRHA opinion, unless classified . . . will be made part of the record . . .). Congress has recognized, however, the longstanding inability of the State Department, even with very limited numbers of applications, to make a meaningful inquiry into an asylum claim.[8] The present system theoretically relies upon American embassies throughout the world to verify facts alleged by individual asylum

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[6]In recognition of this problem, the Select Commission on Immigration and Refugee Policy recommended that area experts be appointed to provide information on conditions in the source country and that carefully drawn profiles be used in order to promote uniformity and equity of initial decisions. Select Committee on Immigration and Refugee Policy, 96th Cong., 2d Sess., Semiannual Report to Congress 202 (Comm. Print 1980) (hereinafter referred to as "Select Commission Report") at 43.

[7]Both the Senate and House in previous versions of the current immigration reform legislation sought to alleviate this problem by requiring special training for immigration judges. *See* Immigration Reform and Control Act of 1983, H.R. 1510, 98th Cong., 1st Sess., 129 Cong. Rec. 346-86 (1983). Current proposed legislation, however, does not contain any provisions concerning this issue; nor does it address any issues concerning political asylum.

[8]Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary. Report on Haitian Emigration, 94th Cong., 2d Sess. 8-9 (Comm. Print 1976).

applicants. Due to limited resources, however, the determinations are often left to the desk officer at the State Department or the Bureau of Human Rights and Humanitarian Affairs, or turn on the vicissitudes of the State Department's general policy toward a particular country. In short, the State Department's recommendation often reflects a political judgment, contrary to Congress' intent,[9] rather than an investigation of individual facts. *Zamora v. I.N.S.*, 534 F.2d 1055, 1059 (2d Cir. 1976); Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. Mich. J.L. Ref. 183, 236 (1984).

As a result, the courts have routinely questioned and criticized the impartiality and utility of State Department reports in the asylum process.[10] In *Kasravi v. I.N.S.*, 400 F.2d 675, 677 n. 1 (9th Cir. 1968), the Circuit Court found the competency of the State Department reports highly questionable in light of the politicization of the process:

> Such letters from the State Department do not carry the guaranties of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world . . . . No hearing officer or court has the means to know the diplomatic necessities

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[9]Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981); Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243 (1984).

[10]*Zamora v. I.N.S.*, 534 F.2d 1055, 1059 (2d Cir. 1976); *Hossein Mardi v. I.N.S.*, 405 F.2d 25, 27 (9th Cir. 1968); *Kasravi v. I.N.S.*, 400 F.2d 673, 677 n. 1 (9th Cir. 1968)

> of the moment, in the light of which the statements must be weighed.

These institutional and procedural defects are particularly problematic because an asylum applicant suffers under special disabilities that make it extremely difficult to present effectively his claim. Both the United Nations High Commissioner for Refugees (UNHCR)[11] and our own federal courts[12] have recognized the extreme problems involved in establishing an asylum claim for an applicant who finds himself "in an alien environment and may experience serious difficulties, technical and psychological in submitting his case to the authorities . . . often in a language not his own."[13]

In addition to the institutional impediments to the establishment of procedures which diminish the risk of error in the immigration court system, the fact-finder is faced with serious cross-cultural obstacles in determining asylum claims and, particularly, in assessing an applicant's credibility. Because of the inquisitorial nature of the asylum process as well as the broad unguided discretion of the immigration judge, an asylum claim critically turns on the judge's perception of the applicant's credibility.[14]

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[11]United Nations High Commissioner for Refugees, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* ¶¶ 189-194 (hereinafter cited as "Handbook").

[12]*Coriolan v. I.N.S.*, 559 F.2d 993, 1004 (5th Cir. 1977); *Zamora v. I.N.S.*, 534 F.2d at 1062; See, also, *Matter of Martinez-Romero*, 18 I&N Dec. 75, 78 (BIA 1981).

[13]*Handbook* at ¶190.

[14]Martin, *Refugee Act of 1980, Its Past & Future*, 1982 Mich. Y.B. Int'l Legal Stud., 115 (1982) ("Bonafide applicants are unlikely

(Continued on following page)

An immigration judge's comprehension of an applicant's testimony, however, is regularly hindered, and even distorted, by cross-cultural differences that often work to the asylum seeker's disadvantage. Even under the best circumstances, these problems can hinder the fact finding process.[15] There are a number of obstacles to undistorted interaction in the asylum adjudication process resulting from cross-cultural misunderstandings, including "powerless speech," the interpreter, different perceptions of time, and the cultural relativity of concepts of truth and falsehood.[16] A finding of lack of credibility can result from, for example, the applicant's hesitation in speech. "Powerless speech" often occurs among "former members of political parties and groups which [were] illegal in their home countries and where activities were largely covert."[17] Eye contact, demeanor, tone of voice, assertiveness, direct

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to have left their homelands with corroborating documentation in hand or with supporting witnesses. Asylum determinations, therefore, revolve critically around a determination of the applicant's credibility.") Comment, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 Harv. C.R.-C.L.L. Rev. 493, 532-535 (1986) (citing the credibility-based and fact-dependent nature of asylum cases); *Damaize-Job v. I.N.S.*, 787 F.2d 1332, 1336-37 (9th Cir. 1986); *Arguetta v. I.N.S.*, 759 F.2d 1395 (9th Cir. 1985). *See also, Coriolan v. I.N.S.*, 559 F.2d 993, 999 (5th Cir. 1977).

[15]Kaelin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, No. 2, 20 Int'l Migration Rev. 230 (1986).

[16]*Id.* at 231. See also, Comment, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 Harv. C.R.-C.L.L. Rev. 493, 528-29 (1986).

[17]*Id. See generally* Latin-American Bureau, *Haiti: Family Business* (1985) (Danger of direct and open speech with governmental authorities in dictatorial societies).

and unceremonious style of speech are all traits which help establish credibility. All of these traits, however, are culturally relative. E. Lind and W. O'Barr, *The Social Significance of Speech In the Courtroom,* Language and Social Psychology (H. Giles and R. St. Clair eds., 1979). These factors have been identified by anthropologists and sociologists as generally characteristic of aliens and profoundly affecting the outcome of either legal proceedings or of cross-cultural communications.[18] An asylum applicant is at a distinct disadvantage when he is being judged for credibility if he is unaware of the social customs of his host society. Such an individual unwittingly communicates a non-credible image solely because of his nonverbal actions:

> People who are new to a culture, or subculture—foreign students, tourists, immigrants, refugees, researchers—are at least for a period in the position of being unskilled in their new environment. Though usually socially skilled in their own culture, they are now forced into the frustrating and embarrassing role of being socially unskilled and inadequate in the new culture. They often do not know the language, they are bewildered by the different social routines . . . . They are unaware of the implicit messages they give or receive by their own or others' nonverbal communication; they are astounded by different conventions of self-preservation, self-disclosure, assertive-

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[18]*Id.* Danet, *Language in the Courtroom,* Language, Social and Psychological Perspectives 367-376 (Giles ed. 1980); Danet, *Language and the Legal Process*, 14 Law & Soc'y Rev., 447 (1979); Mir-Djalali, *The Failure of Language to Communicate: A U.S.-Iranian Comparative Study*, 4 Int'l J. of Intercultural Relations 307 (1980); Furnham & Bochner, *Social Difficulty in a Foreign Culture: An Empirical Analysis of Culture Shock,* Cultures in Contact 190 (Bochner ed. 1982); Gumperz, *Discourse Strategies* (1982).

> ness, and friendship formation. In other words they suffer from what Oberg (1960) called 'culture shock.'

M. Argyle, A. Furnham and J. Graham, *Social Situations,* 344 (1981).[19] Culture shock operates most potently "[t]he greater the disparity between the host society and the sojourners culture . . ." A. Furnham and S. Bochner, *supra* at 190. Such is the condition for the vast majority of asylum applicants who come from the developing nations and are applying for asylum in the West. Kaelin, note 15 at 232.

Linguistic and translation problems also enhance the risk of an erroneous decision in the asylum context. Because of significant linguistic misunderstanding, officials frequently decide an applicant is lying, covering up, or exaggerating, although the applicant is doing his best to honestly provide all the information which he thinks is requested. A. Pousada, *Interpreting For Language Minor-*

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[19]Asylee exodus alone is a traumatic experience. It often occurs under complete panic conditions. Even when long-range planning occurs, exodus is still usually clandestine, dangerous, and with family members left behind or lost en route. The result: asylees are left "midway to nowhere." Kunz, E.F., *The Refugee in Flight: Kinetic Models and Forms of Displacement,* 7 Int'l Migration Rev. 125-146 (1973). The emotional burdens carried by the asylees are often reflected not only in a general sense of malaise, fatigue and psychosomatic complaints, but as evidences of lethargy, withdrawal and seclusion, huddling, expressions of melancholy, and crying in private. Segal, Julius and Norman Lourie, *The Mental Health of the Vietnam Refugees: Memorandum to Rear Admiral S.G. Morrison,* Washington, D.C.: U.S. Department of Health, Education and Welfare, National Institute of Mental Health (1975). Such orientation problems can have strong adverse consequences on the manner in which the applicant's claim is perceived by the judge. *See* Austerlitz, *The Use of Psychological Evaluations in Political Asylum Hearings,* 15 Immigration Newsletter, No. 3 (1986). (Effects on asylees' post-traumatic shock syndrome on claims for asylum.) *See also* D. Haines, *Refugees in the United States* (1985).

ities in the Court, Language in Public Life 186 (Alatis and Tucker eds. 1979). Additional confusion results from misinterpretation of concepts such as self[20] and family,[21] and the filtering of these concepts through different cultural value systems.[22]

These linguistic problems are magnified by problems of translation. One of the greatest misconceptions in the field of linguistic translation is that if a person is bilingual that person is able to interpret. *Seltzer v. Foley,* 502 F. Supp. 600, 607 (S.D.N.Y. 1980). Interpreting in the courts requires close attention to the specific forms of the words as well as their meanings. Technical and legal terms for which there may be no exact linguistic equivalents in the other language have to be dealt with. Consistency of interpretation of key words is vital to the understanding of legal arguments. In addition, there are questions of language and dialect variation. The interpreter must be able to understand and communicate the subtlety of phonological, lexical, and syntactic variation. Pousada, *supra,* at 199.

In recognition of the important role of translators in the courtroom, Congress adopted the Court Interpreters

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[20]To westerners, the self is a dynamic center of motivation, judgment and action. Conversely, many asylum applicants come from group-oriented societies where the center of social life is the family or community. C. Geertz, *The Interpretation of Cultures,* 59 (1973).

[21]C. Charles, *A Panorama of Haitian Culture* Paper presented to Bilingual Program Dade County, Florida Public Schools (June 1986).

[22]See, e.g., C. Huntington, "Language of Jurisprudence," *Language: Its Meaning and Function* (R. Ashen ed. 1971); W. Goodenough, *Culture, Language and Society* 63 (1981).

Act in 1978. 28 U.S.C. § 1827 et seq.[23] This Act took away the trial judges' "wide discretionary powers" in determining when and whom to appoint as an interpreter.[24] The determination of language proficiency is a complex matter. On motion of counsel, a judge must appoint a certified interpreter whose qualifications have been determined by objective standards. The Act, however, is directed solely to proceedings in federal courts and does not include immigration proceedings and asylum hearings, although experts have acknowledged that competent interpretation is most needed in civil and administrative proceedings. Pousada, *supra* at 121. In immigration proceedings there are no regulations governing selection of translators. The result has been non-simultaneous,[25] flawed translations[26] in asylum proceedings.

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[23]Under Section 1827(b) of P.L. 95-539 (Oct. 28, 1978), the Director of Administrative Office of the United States Courts is mandated to "prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters in courts of the United States in bilingual proceedings . . ." The Act provides that the presiding judicial officer shall use the services of a certified interpreter in all criminal and civil actions initiated by the United States in a United States district court.

[24]Congressional Record-House: October, 1978, Pg. 34880. Congressman Fred Richmond, author and sponsor of the bill, concluded that it is not an unreasonable thing to guarantee a person at trial the right to understand all the proceedings, adding that "In this great country of ours, the fact that they must even make this request is a disgrace." See generally, Annot., *Right of Accused to Have Evidence or Court Proceedings Interpreted,* 36 ALR 3rd 276 (1971).

[25]*Matter of Exilus.* 18 I&N Dec. 276 (BIA 1982) (Simultaneous translations not required in asylum hearings).

[26]*Augustin* v. *Sava,* 735 F.2d 32, 35-37 (2d Cir. 1984).

The structural problems inherent in the current asylum adjudication process, the cultural and linguistic difficulties, the applicant's own difficulty and frequent inability to obtain information to support his claim for asylum, all enhance the risk of an erroneous decision in the asylum proceeding. The establishment of a more generous standard in asylum will serve to allocate the risk of error in a more balanced manner to compensate for the numerous deficiencies in the present asylum process.

C. The Government's Interest.

The utilization in an asylum proceeding of a less onerous standard than that employed in other immigration proceedings does no harm to any governmental interest. Immigration judges already utilize different standards in different types of hearings.[27] Indeed, immigration judges are familiar with the subtleties of shifting burdens of proof.[28] The use of one standard for political asylum and another for withholding of deportation under § 243(h) of the Immigration and Nationality Act would not, therefore, pose any additional administrative burdens on the agency. Financially, no additional costs would be imposed by utilization of a more generous standard for asylum. Moreover, the utilization of a less onerous standard in this context does not require the establishment of any new

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[27]Compare, determination of deportability by the "clear, unequivocal and convincing" standard with the determination of excludability where the excludable alien has the burden of proving clearly and beyond a doubt that he is entitled to enter the United States. 8 U.S.C. § 1325(b).

[28]8 U.S.C. § 1361; *Matter of Benitez,* I.D. #2979 (BIA 1984).

procedures within the agency, the establishment of new organizations or even hiring of any new personnel. In short, it places no additional burdens on immigration judges adjudicating asylum claims.

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CONCLUSION

This Court has repeatedly expressed its concern for minimizing the risk of error when the consequences of error are great. It is beyond cavil that an error in the asylum adjudications context may result in the most serious deprivation possible—life itself. The current procedures employed in the asylum process and the standard of proof urged by the government do not adequately safeguard against the potential risk of error. The utilization of a more generous standard in asylum will help to minimize the risk of error and will not result in any additional fiscal or administrative burdens. Under these circumstances, this Court's analysis in *Mathews* strongly supports the use of a more generous standard of proof in asylum urged by the lower court and advanced by the respondent here.

Respectfully submitted,

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